"REPORTABLE"

* **HIGH COURT OF DELHI AT NEW DELHI**

+ **CS (OS) No. 1542/2007**

Date of decision : December 20, 2007

Swatch Limited ..... PLAINTIFF

!

Through : Mr. Suhail Dutt, Advocate

Versus

$ Priya Exhibitors Private Ltd. .....DEFENDANT

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Through : Nemo.

%

CORAM:
HON'BLE MS. JUSTICE ARUNA SURESH

(1) Whether reporters of local paper may be allowed to see the judgment?

(2) To be referred to the reporter or not? Yes

(3) Whether the judgment should be reported in the Digest ? Yes

ARUNA SURESH, J.

1. Plaintiff company Swatch Limited, registered under the laws of Switzerland, has filed the present suit for recovery of money amounting to CHF 97,554.18 (Rs. 3,511,950.48/-) against the defendant.

2. Undisputed facts as pleaded in the plaint are that the plaintiff company entered into a distribution agreement

with the defendant for watches manufactured by the plaintiff in the territory of North and East India for a term of 3 years from March 1, 2000 to February 28, 2003. Subsequent to February 28, 2003, plaintiff supplied watches to the defendant amounting to CHF 47,554.18 (approximately Rs. 17,11,950.48/-) during the month of July, 2003 and raised seven invoices dated 10.7.2003, 21.7.2003, 21.7.2003, 28.7.2003, 28.7.2003, 30.7.2003, 30.7.2003 for the said amount. Besides plaintiff has also claimed imprest amount from the defendant amounting to CHF 50,000 and accordingly raised a demand on the defendant for the payment of the said amounts totaling to CHF 97,554.18 vide letter dated 12.4.2006 within 21 days.

3. In para 14 of the plaint, it is averred by the plaintiff that as per article 17 of the of the distribution agreement any dispute arising out of it between the parties is to be governed by and interpreted and construed in accordance with Swiss laws and law of limitation under the Swiss Law is 10 years as per general rule set out in Article 127 of the Swiss Code of Obligations. Therefore, plaintiff has claimed that the suit is within the period of limitation. Plaintiff has claimed that Courts at Delhi has the jurisdiction to entertain the present suit as defendant has its registered

office in Delhi. The cause of action has arisen in Delhi as the goods were supplied by the plaintiff at Delhi and the business of the defendant is conducted from Delhi.

4. Since prima facie from the averments contained in the plaint, the suit of the plaintiff was found to be barred by period of limitation as it was filed approximately a year after the expiry of period of limitation, the matter was placed before the Court for directions regarding the issue of limitation, vide order of the Joint Registrar dated 23.8.2007. I have heard learned counsel for the plaintiff at length and have gone through the pleadings contained in the plaint as well as documents placed on record.

5. Article 17 of the Distribution Agreement dated 1.3.2000 inter se the parties is relevant for the purposes of present issue under consideration. Hence, it is reproduced as follows:

> "This agreement shall be governed by, and interpreted and construed in accordance with Swiss Law. The parties herewith expressly exclude the applicability of the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980.
> Any and all disputes arising in connection with this agreement shall be

submitted solely to the competent courts
of Canton of Bern/Switzerland."

6. Reading of this article makes it clear that the parties to the agreement are governed by the Swiss laws and the agreement has to be interpreted and construed in accordance with the laws of Switzerland. In case of dispute having arisen in connection with this agreement, the parties agreed to submit solely to the competent courts of the Canton of Bern/Switzerland. In other words, the parties agreed that the Swiss courts shall have the jurisdiction to entertain a dispute arising out of the contract and the parties shall be governed by the Swiss laws. These laws clearly exclude the jurisdiction of the Indian Courts to entertain any dispute or claim arising out of this agreement and also application of Indian laws to such disputes. The fact remains the plaintiff chose to file the present suit in India and not in Switzerland. This agreement came to an end on 28.2.2003. Therefore, after the termination of the agreement by afflux of time, it takes out the defendant from the purview of application of Article 17. Therefore, claim of the plaintiff for imprest amount of CHF 50,000 under the agreement dated 1.3.2000 which came to an end on 28.2.2003 is barred by period of limitation by application of Indian laws.

7. Learned counsel for the plaintiff has submitted that though this agreement came to an end on 28.2.2003 still claims in the present suit and the disputes arisen between the parties would continue to be governed by Article 17 of the Distribution Agreement. I do not find any force in these submissions. After this agreement came to an end, it was never renewed between the parties nor any fresh agreement was executed. As per the documents placed on the record, plaintiff did supply watches vide seven invoices of different dates for the period from 10.7.2003 to 30.7.2003. Letter dated 11.7.2003 is addressed to the defendant by the plaintiff. Perusal of this letter clearly indicates that the goods supplied by the plaintiff company to the defendant through said seven invoices did not constitute an agency relationship between the parties nor a distribution agreement or like arrangement whether express or implied. It was also made clear that the defendant shall not be entitled to hold itself out as an agent, or a representative or distributor or official dealer or the like of Swatch Ltd. Same are the contents contained in the letter dated 18.7.2003, 25.7.2003 and 31.7.2003. Thus, it is clear that after 28.2.2003 the Distribution Agreement came to an end automatically and therefore, it cannot be said that Article 17 of the

agreement continued to be applied to the transaction which took place inter se the parties after 28.2.2003. Hence except the claim of the plaintiff for the imprest amount which was given to the defendant in terms of the said agreement no other claim of the plaintiff falls within the purview of Article 17 of the Agreement.

8. Now it is to be seen if once this agreement has come to an end, whether parties to the suit continued to be governed under the Swiss laws and the disputes arising out of transactions can only be referred to and claimed by way of a suit in a Swiss Court. It is admitted proposition of law that where more than one courts have jurisdiction, parties by consent can confer jurisdiction on one of the courts. But where a court lacks inherent jurisdiction to entertain a suit, parties by consent cannot confer jurisdiction in that court.

9. Para 2 of the letter dated 11.7.2003 speaks of application of internal laws of Switzerland and para 3 speaks of jurisdiction of Swiss Court in case of disputes and controversies arisen between the parties out of the supply of goods by the plaintiff to the defendant. These relevant portions of the letter read as follows:

> "The legal effect of all dealings between the parties is to be interpreted according to the internal laws of Switzerland. Without limiting the generality of the foregoing, the parties expressly exclude the applicability of the United Nations Convention on Contracts for the International Sale of Goods of April, 11, 1980.
>
> All disputes and controversies arising between the parties are to be submitted for determination exclusively to the Courts of the Canton of Bern in Switzerland. Notwithstanding the foregoing, Swatch LTD. may at its option seek interim and permanent injunctive relief before any Court or like judicial instance, which in the absence of the foregoing provision, would have jurisdiction to grant the relief sought."

10. Though the plaintiff reserved its rights to invoke jurisdiction of the Swiss Court and the application of Swiss laws but also kept an option with it to seek interim and permanent injunctive relief before any court which in the absence of the provisions contained in above would have jurisdiction to grant the relief. In all the other letters dated 18.7.2003, 25.7.2003 and 31.7.2003 these two paragraphs have been repeated in verbatim.

11. Learned counsel for the plaintiff tried to state that in view of the last three lines of the letters, plaintiff has the option to invoke the jurisdiction of Delhi Court and also has right to waive its right to file the suit in Swiss Court. These submissions are devoid of merits. Right of the

plaintiff is restricted to seek an interim and permanent injunctive relief before any Court. The present suit is not for seeking an interim or permanent injunctive relief but is simple suit for recovery of money. Therefore, the present suit does not fall in the last three lines of the letter dated 11.7.2003 and other letters (dated 18.7.2003, 25.7.2003 and 31.7.2003) and therefore, plaintiff cannot be allowed to interpret letter written by itself to its own advantage. I do not find any communication on behalf of the defendant controverting the contents of the said letters nor any objection to the invocation of jurisdiction of the Swiss Court and the Swiss law.

12. Matter does not end here. Plaintiff served legal notices for demand upon the defendant. These notices are dated 12.4.2006, 26.10.2006 and 17.11.2006 and a notice issued by Solicitors & Advocates at Delhi dated 25.7.2006.

13. In the letter dated 26.10.2006 it is made clear in the following words:

> "Please be advised that unless the amount of CHF 97,554.18 representing your debt towards Swatch Ltd. (excluding interest) is received by Swatch Ltd. on its bank account as earlier

> advised within 1 days from this letter, a claim for payment of this outstanding amount will be filed against you in the courts of the Canton of Berne, Switzerland, such jurisdiction having been agreed by you."

14. While referring to the letter dated 26.10.2006, in the letter dated 17.11.2006 the plaintiff informed the defendant that since no payment had been received from it, Swatch Limited would file a claim for payment of the outstanding amounts against it in Switzerland. Thus, it is clear that at no point of time plaintiff agreed to file a suit to claim its money from the defendant within the jurisdiction of this Court.

15. Learned counsel for the plaintiff has alleged that he had a right to waive the jurisdiction of Swiss Court and has the right to file the present suit in Delhi. He has referred to ***Rhodia Ltd. and others v. Neon Laboratories Ltd. - AIR 2002 Bombay 502***. In the said case, an agreement was entered into between English Company incorporated under the English Law and an Indian company wherein it was agreed to give exclusive right to the Indian company to market and distribute the pharmaceutical products manufactured in India by the English company in the

territories of India. The agreement further provided that the governing language of the subject agreements shall be English including formation thereof and performance thereunder be governed by and construed in accordance with English law. The parties, therefore, expressly intended the contract to be governed by and construed in all respects, including the formation thereof and performance thereunder in accordance with the English law. It was held that under those circumstances English law will be proper law of the subject agreements. The 'proper law' refers to the substantive principles of the domestic law of the chosen system and not to its conflict of laws rules. The only limitation over this rule is that the intention of the parties must be expressed bona fide and it must not be opposed to public policy. Considering the transaction between the parties which was a contract in international trade and commerce and the parties having agreed expressly to submit to the jurisdiction of English courts and English laws, it was held that the dispute has to be settled by the English courts. It was further observed that as per the settled principles of law a foreign law ought to be pleaded like any other fact and must be proved by evidence of experts in that law being matters of evidence requiring proof as questions of fact, if a party wants to rely

on the same. Halsbury's Laws of India, 10th Edition was also referred to which is reproduced as below:

> "75.237. Need for proof; Foreign law is a question of fact. It must be specifically pleaded by the party or parties relying upon it. It must be proved to the satisfaction of the court like other plea set up by the concerned party or parties. Thus, the onus of proof of foreign law lies on the party relying on it.
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> 75.238. Mode of proof: In general, an Indian Court will not research into foreign law or the concepts which have foreign origin. The foreign law or the concepts must be proved in civil proceedings by properly qualified witneses, that is a person who is suitably qualified to do so on account of his knowledge or experience and who is competent to give expert evidence as to the alw of any country, irrespective of whether he has acted or is entitled to act as a legal practitioner there. If his evidence is not contradicted, the Court will normally accept it, unless it is obviously unreliable or extravagant. Where the witnesses deposit materials as part of their evidence into Court, the Court is entitled to examine those materials, and where there is conflict of evidence as to the interpretation to be placed upon the materials, the Court must scrutinise them and form its own conclusion on them.
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> Because foreign law or concepts of a foreign origin are questions of fact, courts may not generally at common law rely upon

> a previous Indian decision on foreign law."

16. Coming back to the facts and circumstances of this case, despite repeated questioning the plaintiff has not pleaded Swiss laws which it seeks to invoke like any other fact which it is required to prove in evidence. Learned counsel for the plaintiff has argued that in para 14 of the plaint, he has pleaded the Swiss law governing the period of limitation for filing a claim of the nature like before me. However, it cannot be disputed that he has not pleaded the Swiss laws which will govern the case if the Swiss laws are to be applied to the dispute inter se the parties.

17. In ***National Thermal Power Corporation v. The Singer Company and others – AIR 1993 SC 998*** where a similar issue was raised, it was observed that if the intention of the parties is expressly stated in the contract or it can be clearly inferred from the agreement itself or the surrounding circumstances, such intention determines the proper law of the contract. But where the intention of the parties is not stated and no inference can be drawn, their intention has no relevance and in that event, the Courts endeavour should be to infer intention by identifying the legal system with which the transaction had its closest and most real connection. It was also observed

that expressed intention of the parties is generally decisive in determining the proper law of the contract subject to the condition that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. In that case, in view of the contract inter se the parties it was held that there was no need to draw inference about the intention of the parties or to impute any intention to them, for they have clearly and categorically stipulated that their contract made in India to be performed in India is to be governed by the laws in force in India and the Courts in Delhi have all jurisdiction to entertain the matter under the contract.

18. In the present case, the parties had expressly and clearly entered into an agreement to the effect that the dispute arising out of the contract will be governed by Swiss laws and the Courts at Switzerland shall have the exclusive jurisdiction in all the matters arising out of the contract.

19. As to waiver of the objection to the territorial jurisdiction of a Court, learned counsel for the plaintiff has referred to ***Bahrein Petroleum Co. Ltd. v. P.J. Pappu and another – AIR 1966 SC 634***.

20. As per Civil Procedure Code, section 20-21 of the CPC, defendant can raise objection to the territorial jurisdiction of the Court and he can waive such objection agreeing to come to the jurisdiction of the Court in which the suit has been filed against him. This plea of waiver is not available to the plaintiff. Therefore, ***Bahrein Petroleum Co. Ltd. (supra)*** is of no help to the plaintiff. Plaintiff cannot be allowed to arbitrarily choose its own jurisdiction to file its suit.

21. In ***British India Steam Navigation Co. Ltd. v. Shanmughavila Cashew Industries – (1990) 3 SCC 481***, it was observed that the jurisdiction of a Court can be decided upon by the parties themselves on basis of various connecting factors. The parties to a contract in international trade or commerce can agree in advance to a forum which is to have jurisdiction to determine disputes which may arise between them. The express choice of law made by parties obviates need for interpretation. This chosen court may be a court in the country of one or both the parties, or it may be a neutral forum. It is a question of interpretation, governed by the proper law of the contract, whether a jurisdiction clause is exclusive or non-exclusive, or whether the claim which is the subject matter of the

action falls within its terms. It is only in case when no express choice of the proper law is made that the law of the country of the chosen court will usually but not invariably, be the proper law. Principle of law as laid down in this judgment is not disputed rather it goes against the plaintiff as the parties to the contract expressly chose the forum of jurisdiction to be that of the Swiss court.

22. In view of the discussion as above, it is concluded that this court has no jurisdiction to entertain the present suit in terms of the express agreement and intention of the parties to invoke the jurisdiction of a Swiss Court in case a dispute arose inter se them. In view of this, I need not to go into the question of limitation as pleaded as Swiss laws cannot be made applicable to the present dispute raised in the present case especially when the Swiss laws are not specifically pleaded and also for the simple reason that I find that this Court has no jurisdiction to entertain the present suit as discussed above.

23. Hence, plaint is hereby rejected.

DECEMBER 20, 2007 **ARUNA SURESH, J**
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